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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 354

LON CHRISMOND, *Petitioner*

vs.

MRS. MABEL CHRISMOND, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 354

LON CHRISMOND, *Petitioner*

vs.

MRS. MABEL CHRISMOND, *Respondent*

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Jurisdictional Statement

The jurisdiction of this Honorable Court is invoked under New Title 28, United States Code, Judiciary and Judicial Procedure, Section 1257 (3), together with Rules 9, 10, 12, 36 and 38 of this Court.

Summary Statement of Matters Involved

Petitioner was defendant in Mrs. Mabel Chrismond vs. Lon Chrismond, wherein the Chancery Court of Sharkey County, Mississippi, granted the relief of divorce and re-

quired the defendant to convey to complainant certain real estate, June 22, 1950, Tr. 22 to 25, Appendix "A", and the Supreme Court of Mississippi affirmed in Cause No. 37948, May 21, 1951, Tr. 31 to 43, Appendix "B". Suggestion of Error was filed setting up in Ground 8 thereof the lack of jurisdiction in the Court to render judgment, in violation of the Fourteenth Amendment to the Constitution of the United States, Tr. 47 and 48, and the Supreme Court of Mississippi overruled the Suggestion of Error on July 9, 1951, Tr. 49, Appendix "C".

A.

The Parties:

1. Mrs. Mabel Chrismond, sole complainant and appellee in Supreme Court of Mississippi and respondent here.

2. Lon Chrismond, defendant, appellant in Supreme Court of Mississippi, and petitioner here.

B.

The Facts:

Mrs. Mabel Chrismond filed her original bill of complaint in the Chancery Court of Sharkey County, Mississippi, alleging:

> "Comes now your petitioner herein, Mrs. Mabel Chrismond, an adult person of the Caucasian race, resident of said county and state, and complains of the defendant herein, Lon Chrismond, an adult person of the Caucasian race, and for cause of complaint, complaining says:
>
> "1.
>
> "That the complainant and the defendant herein were married in accordance with law, in the situs of Lake Village, in the State of Arkansas, on or about the 15th day of November in the Year 1942, and thereafter lived

as man and wife in the County of Sharkey, State of Mississippi, until approximately thirty days before the filing of this petition...". Tr. 1.

It is to be noted that the bill does not allege that "one of the parties has been an actual bona fide resident within this state for one year next preceding the commencement of the suit", though Section 2736 of the Mississippi Code of 1942 limits the jurisdiction of the Chancery Court to such cases.

The decree of the Chancery Court of Sharkey County commanded Lon Chrismond to convey to Mabel Chrismond a house and lot in Rolling Fork, Mississippi, as alimony, and on his failure so to do, the Clerk of the Court was named Commissioner and directed to make the deed, Tr. 22 to 25.

It is contended by petitioner:

(1) That the Chancery Court in Mississippi exercises a limited jurisdiction in matters of divorce;

(2) That Section 2736 of the Mississippi Code of 1942 expressly limits the court's jurisdiction to those cases "where one of the parties has been an actual bona fide resident within this state for one year next preceding the commencement of the suit, Appendix "D";

(3) That where a court is exercising a limited statutory jurisdiction it is necessary for the jurisdictional facts to be expressly alleged in the pleadings;

(4) That the allegations in the bill that complainant is "a resident of said county and state" and that the parties were married in the year 1942 in Lake Village, Arkansas, "and thereafter lived as man and wife in the County of Sharkey, State of Mississippi", Tr. 1, are not sufficient to charge actual bona fide residence in this state for a period of one year next preceding the commencement of this suit;

(5) That the bill did not confer upon the court jurisdiction of the subject matter of the suit—divorce—and the court had no jurisdiction to render the decree herein rendered and the matter is coram non judice;

(6) That the decree taking the property of Lon Chrismond is coram non judice and in violation of Article Fourteen of the Amendments to the Constitution of the United States and constituted a deprivation of said property without due process of law;

(7) That said constitutional question was raised by the Suggestion of Error filed to the Supreme Court of Mississippi Opinion, rendered on May 21, 1951, reported in 52 So. 2d 624, Tr. 47 and 48, and is now property before this court.

Questions Whereasto Certiorari is Herein Sought.

The questions involved here are of such importance as to demand certiorari. They are:

1. Does Article Fourteen of the Amendments to the Constitution of the United States protect the property rights of a citizen against the taking of his property without compensation by the void decree of a State Court, acting without jurisdiction?

2. Does a void decree of a State Court, rendered by a court without jurisdiction and which decree requires, by judicial fiat, the conveyance of property by the owner to another without compensation constitute a deprivation of said property without due process of law and deny to petitioner the equal protection of the laws within the meaning of Section I of Article Fourteen of the Amendments to the Constitution of the United States?

Reasons Why Certiorari Should Be Herein Granted.

As immediately heretofore shown:

(A) Petitioner is being deprived of his private property, without compensation, by the judicial fiat of a void decree, rendered by a State Court, without jurisdiction, in total disregard and in utter violation of his constitutional right, guaranteed to him by Section I of Article Fourteen of the Amendments to the Constitution of the United States.

(B) Petitioner has been ordered by the void decree of the State Court, rendered by a court having no jurisdiction, to convey his private property to respondent, without compensation, and this decree has been affirmed by the Supreme Court of Mississippi, the highest court of the State, and petitioner is being deprived of his property without due process of law. Unless this Honorable Court grants certiorari, said void decree will become effective to deprive him of his property and will constitute a deprivation of said property without due process of law and will deny to petitioner the equal protection of the laws within the meaning of Section I of Article Fourteen of the Amendments to the Constitution of the United States.

(C) Petitioner has exhausted all of his remedies in the courts of the State of Mississippi. Unless certiorari is granted petitioner will be unable to have the decree complained of reviewed, reversed and set aside, even though said decree is void, was rendered by a court having no jurisdiction so to do, and deprives petitioner of his said property without due process of law and denies to petitioner equal protection of the laws within the meaning of Section I of Article Fourteen of the Amendments to the Constitution of the United States.

Wherefore, petitioner prays for a Writ of Certiorari from this Honorable Court directed to the Supreme Court of Mississippi, commanding that court to certify and send to this Court for its review and determination, on a day named therein, a full and complete transcript of the record and all of the proceedings in the case of Lon Chrismond, Appellant, vs. Mabel Chrismond, Appellee, No. 37948 on the docket of that Court, and that the decree of said Court may be reversed and appropriate rectification here had.

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Ross R. Barnett
Attorneys for Petitioner

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 354

LON CHRISMOND, *Petitioner*

vs.

MRS. MABEL CHRISMOND, *Respondent*

BRIEF FOR PETITIONER

Opinions Below

The opinion of the Chancery Court of Sharkey County, Mississippi, dated June 22, 1950, is printed in the record at page 22-25 and is made Appendix "F" to this brief.

The opinion of the Supreme Court of Mississippi is dated May 21, 1951, is reported in 52 So. 2d 624, is printed in the record at page 31-43 and is made Appendix "B" to this brief.

Basis For Jurisdiction

The jurisdiction of this Court is invoked under New Title 28, United States Code, Judiciary and Judicial Procedure, Section 1257 (3) together with Rules 9, 10, 12, 36 and 38 of this Court.

Statutes Involved

Section 2736 of the Mississippi Code of 1942 and Section 1 of Article Fourteen of the Amendments to the Constitution of the United States.

Statement of Material Facts

Respondent, Mrs. Mabel Chrismond, filed suit for divorce against Petitioner, Lon Chrismond, in the Chancery Court of Sharkey County, Mississippi, and prayed for a division of the property alleged to have been accumulated by the joint efforts of the parties.

The original bill of complaint is printed at Page 1-7 of the record. Regarding the residence of the parties, the bill only alleged that the complainant, Mrs. Chrismond, was a resident of Sharkey County and that she and petitioner were married in Lake Village, Arkansas, in 1942, and thereafter lived as man and wife in the County of Sharkey, State of Mississippi, until approximately thirty days before the filing of the bill, and that immediately after such marriage the parties came to Rolling Fork, Sharkey County, and established their home.

The original bill does not allege that one of the parties has been an actual bona fide resident of the State of Mississippi for one year next preceding the commencement of the suit, though Section 2736 of the Mississippi Code of 1942 limits the jurisdiction of the Chancery Court to those cases, unless the above allegations can be so construed with positiveness, and, as will be hereinafter shown, they cannot be so construed.

It is contended that one year's actual bona fide residence next preceding the filing of the bill is a jurisdictional fact that must exist before the statute gives any right to file the suit; that the Chancery Court exercises a limited jurisdiction in matters of divorce; that every jurisdictional fact must be alleged in the pleading; and, in the absence of the allegation of a necessary jurisdictional fact, the bill does not state a cause of action and any decree rendered thereon is void.

It is contended by petitioner that the decree rendered by

the Chancery Court of Sharkey County, Mississippi is, for the above reason, void, and coram non judice.

Said decree ordered Lon Chrismond to convey certain real estate to respondent, and it is contended that he is being, by said void decree, deprived of said real estate without due process of law within the meaning of Section I of Article Fourteen of the Amendments to the Constitution of the United States.

ARGUMENT

Point One

This Court Will Determine for Itself the Question of the Jurisdiction of the State Court to Render the Decree and the Validity of the Decree Rendered By It.

Upon a Writ of Certiorari to review the decree of the highest court of a state upon the ground that the decree rendered by a State Court without jurisdiction was against a right claimed under the Constitution of the United States, the Supreme Court of the United States is not bound by the State Court's construction of a statute and must decide for itself the true construction of the statute and the question of the jurisdiction of the State Court to render the decree appealed from. *Scott* v. *McNeal,* 154 U. S. Rep. 34, 34 L. Ed. 896; 14 S. Ct. Rep. 1108; *Pennoyer* v. *Neff,* 95 U. S. 714, 733; 24 L. Ed. 565, 572; *Old Wayne Life Association of Indianapolis, Indiana* v. *Sarah McDonough et al,* 204 U. S. 8, 51 L. Ed. 345, 27 S. Ct. 226.

Point Two

In the State of Mississippi Divorce is Purely a Statutory Proceeding.

In Mississippi the jurisdiction of the Chancery Court to grant a divorce depends solely upon statute and is not de-

rived from the common law. This brings into operation the well established rule that where a statute creates a right of action which did not exist as the common law and the same statute fixes the conditions upon which the right may be asserted, the conditions are an integral part of the right thus granted—are substantive conditions, the observance of which are essential to the assertion of the right. *Price* v. *Price,* 202 Miss. 268, 32 So. 2d 124, United States ex rel; *Texas Portland Cement Co.* v. *McCord,* 233 U. S. 157, 34 S. Ct. 550, 58 L. Ed. 893.

POINT THREE

In Matters of Divorce in Mississippi the Chancery Court Exercises a Special and Limited Jurisdiction.

Section 2736 of the Mississippi Code of 1942 reads as follows:

> "2736. JURISDICTION LIMITED.—The jurisdiction of the Chancery Court in suits for divorce shall be confined to the following cases: (a) Where one of the parties has been an actual bona fide residen. within this state for one year next preceding the commencement of the suit. (b) In any case where the proof shows that a residence was acquired in this state with a purpose of securing a divorce, the court shall not take jurisdiction thereof, but dismiss the bill at the cost of complainant."

Under this statute the complainant must have "actually and voluntarily" established residence within the state for a year next preceding commencement of a divorce suit, "with a bona fide intention of remaining within the state at least indefinitely in order to give the court jurisdiction." *Lucia* v. *Lucia,* 200 Miss. 520, 27 So. 2d 774; *Smith* v. *Smith,* 194 Miss. 431, 12 So. 2d 428.

Limited or special jurisdiction is jurisdiction which is confined to particular causes or which can be exercised only under the limitations and circumstances prescribed by the statute. 21 C.J.S. Sec. 16, P. 33, *Midwest Piping & Supply Co.* v. *Thomas Spacing Mach. Co.*, 167 A. 636, 638, 109 Pa. Super. 571.

POINT FOUR

Chancery Court, Though a Court of General Jurisdiction, its Jurisdiction Will Not be Presumed When Exercising a Purely Statutory Power.

There is no presumption of jurisdiction where a court of general jurisdiction exercises, in a special statutory manner, or otherwise according to the common law, special statutory powers not belonging to it as such court, and not within its ordinary jurisdiction, since, under such circumstances the court stands, with respect to the special power exercised, on the same footing with courts of limited and inferior jurisdiction. 21 C.J.S. Sec. 96, P. 151, 152. *Platts* v. *Platts*, 215 P. 464, 37 Idaho, 149; *Brown* v. *Van Kwien*, 172 N. E. 1, 340 Ill. 118; *Keal* v. *Rhydderck*, 148 N. E. 53, 317 Ill. 231; *Crabtree* v. *Aetna Life Ins. Co.*, 111 S. W. 2d. 103, 108, 341 Mo. 1173.

POINT FIVE

No Presumption Exists in Favor of the Jurisdiction of Courts of Limited or Special Jurisdiction.

No presumption exists in favor of the jurisdiction of courts of limited or special jurisdiction and jurisdiction in such cases must affirmatively appear. So the mere exercise of jurisdiction by such court does not raise a presumption of the existence of the requisite jurisdictional facts and one

seeking or claiming the right to bring such a proceeding must affirmatively show its jurisdiction by alleging and proving it. 21 C.J.S. Sec. 97, P. 153. *Adams* v. *First National Bank,* 103 Miss. 744, 60 So. 770; *Henderson-Molpus Co.* v. *Gammill,* 149 Miss. 576, 115 So. 716; *Jackson Equipment Service Co.* v. *Dunlop,* 160 So. 734, 177 Miss. 752; *Broom* v. *Board of Supervisors of Jefferson Davis County,* 158 So. 344, 171 Miss. 586; *Mingus* v. *Wadley,* 285 S. W. 1084, 1089, 115 Tex. 551; *Forbes* v. *State Council, Junior Order United American Mechanics of Virginia,* 60 S. E. 81, 107 Va. 853.

POINT SIX

The Statutory Requirement of One Year Residence in This State Next Preceding Commencement of Suit is Jurisdictional and Must be Both Alleged in the Bill and Proven on the Trial.

Where a statute requires that one of the parties shall have been an actual bona fide resident within the state for a period of one year next preceding the commencement of the suit, as is required by Section 2736 of the Mississippi Code of 1942, to authorize the court to entertain jurisdiction, the complaint must contain an affirmative allegation showing the actual bona fide residence of one of the parties within the state for a period of one year next preceding the commencement of the suit, without which averment the court has no jurisdiction of the cause. 17 Am. Jur. Sec. 299, P. 303; *Winston* v. *Winston,* 271 F. 551; *Wood* v. *Wood,* 59 Ark. 441, 27 S. W. 641, 28 L.R.A. 157, 43 Am. St. Rep. 42; *Miller* v. *Miller,* 33 Fla. 453, 15 So. 222, 24 L.R.A. 137; *Warren* v. *Warren,* 73 Fla. 764, 75 So. 35, L.R.A. 1917 E. 490; *Prall* v. *Prall,* 58 Fla. 496, 50 So. 867, 26 L.R.A. (N.S.) 577; *Griffin* v. *Griffin,* 130 Ga. 527, 61 S. E. 16, 16 L.R.A. (N.S.) 937, 14 Am. Cas. 866; *Strode* v. *Strode, 3 Bush* (Ky.) 227, 96

Am. Dec. 211; *Rumping* v. *Rumping*, 36 Mont. 39, 91 P. 1057, 12 L.R.A. (N.S.) 1197; *Holton* v. *Holton*, 64 Or. 290, 129 P. 532, 48 L.R.A. (N.S.) 779; *Duxstad* v. *Duxstad*, 17 Wyo. 411, 100 P. 112; 129 Am. St. Rep. 1138; *Owens* v. *Owens*, 189 Ga. 388, 5 S. E. 2d 883; *Price* v. *Price*, 202 Miss. 268, 32 So. 2d 124; *Cooper* v. *Cooper*, 210 Ala. 13, 97 So. 66; *Anderson* v. *Anderson*, 5 Alaska, 138; *Loudon* v. *Loudon*, 189 P. 725, 46 Cal. App. 599; *Hetherington* v. *Hetherington*, 160 N. E. 345, 200 Ind. 56; *Barricelli* v. *Barricelli*, App. 300 S. W. 1023; *Clark* v. *Clark*, 210 P. 93, 64 Mont. 386; *Gondas* v. *Gondas*, 130 A. 600, 98 N. J. Eq. 107; *Bonami* v. *Bonami*, 284 N. Y. S. 796, 246 App. Div. 822; *Ellis* v. *Ellis*, 130 S. E. 7, 190 N. C. 418; *Frazer* v. *Frazer*, 71 Pa. Super. 382; *Coffman* v. *Coffman*, Civ. App. 71 S. W. 2d 331; *Hunter* v. *Hunter*, Civ. App. 286 S. W. 257; *Gallagher* v. *Gallagher*, Civ. App. 214 S. W. 516; *Blankenship* v. *Blankenship*, 100 S. E. 538, 125 Va. 595; *Parks* v. *Parks*, 153 S. E. 242, 109 W. Va. 138; 27 C.J.S. Sec. 107, P. 694.

POINT SEVEN

The Facts Regarding Residence, Charged in the Complaint, are Insufficient to Charge One Year's Bona Fide Residence Within the State Next Preceding the Commencement of the Suit.

The Supreme Court of Mississippi has held that to constitute a complainant an actual bona fide resident of a county in this state, there must have been (1) an actual residence; (2) "voluntarily" established in such county; (3) "with the bona fide intention of remaining there, if not permanently, at least indefinitely." *Smith* v. *Smith*, 194 Miss. 431, 12 So. 2d 428. See also *Sneed* v. *Sneed*, 123 P. 312, 314, 40 L.R.A. (N.S.) 99, 14 Ariz. 17; *Kidman* v. *Kidman*, 164 P. 2d 201, 202, 109 Utah 81.

It will be noted that to meet the requirements of Section 2736 of the Mississippi Code of 1942 the complainant must allege actual bona fide residence within this state for a period of one year next preceding the commencement of the suit, following substantially the language of the statute, or, in the alternative he must allege facts meeting in substance the requirement and intendment of the statute. If he follows the latter, three things must be alleged to give the court jurisdiction, viz: (1) Actual residence for one year next preceding the commencement of the suit; (2) "Voluntary" establishment of such residence, and (3) With the bona fide intention of remaining there, if not permanently, at least indefinitely.

When we measure the allegations of the bill, Tr. 1, against the requirements of this statutory yardstick, we find the allegation that Mrs. Chrismond was a resident of Sharkey County, Mississippi, at the time of the filing of the complaint. This allegation does not charge that she had been a resident of Sharkey County, Mississippi, for a period of one year next preceding the commencement of the suit. Neither does it charge that she had "voluntarily" established her residence there. Neither does it charge that such residence was established there with the bona fide intention of remaining there, if not permanently, at least indefinitely.

The next allegation of the bill is that she and petitioner were married in Lake Village, Arkansas, in 1942 and thereafter lived as man and wife in the County of Sharkey, State of Mississippi, until approximately thirty days before the filing of the bill. Here we again find there is a total absence of any allegation either that such residence was established voluntarily or that such residence was established with a bona fide intention of remaining there, if not permanently, at least indefinitely. In addition the allegation does not charge residence for one year next preceding the commence-

ment of the suit, but charges residence only up until thirty days previous to the filing of the bill. To reside in Mississippi for one year less thirty days does not satisfy the statute. The only allegation is that she lived in Sharkey County, Mississippi, from the date of the marriage in 1942 up to thirty days before the filing of the suit. By no construction that can be reasonably given to it, does this meet the requirement of the statute of one year's actual bona fide residence next preceding the filing of the suit.

The Supreme Court of Mississippi, in construing Section 2772 of the Mississippi Code of 1906, now appearing as Section 888 of the Mississippi Code of 1942, which statute requires that sales of land under deeds of trust shall be advertised for three consecutive weeks preceding such sale in a newspaper published in the county where the land is situated, held that such statute requires publication to be made for the three weeks next preceding the sale and that a sale was void where a longer period of time than one week elapsed between the day of the last publication and the day of the sale. *Planters Mercantile Co.* v. *Braxton,* 120 Miss. 470, 82 So. 323.

It follows, logically, that since the statute, Sec. 2736, Code of 1942, requires actual bona fide residence in this state for one year next preceding the commencement of the suit before the court has jurisdiction of the suit, this requirement is not met by an allegation of residence only up to thirty days before the filing of the bill of complaint.

The only other allegation in the bill of complaint in regard to residence is to the effect, Tr. 1, that immediately after the marriage the parties came to Rolling Fork, Sharkey County, and established their home. Remember, the bill of complaint charges this was in 1942. The bill is silent as to whether it thereafter continued to remain their home. One can have his home in one place one day and can change it

at any time thereafter as he desires. To charge that the parties established their home in Sharkey County, Mississippi, in 1942 falls far short of charging that said situs continued and remained their home up to September 27, 1949, when the bill of complaint in this suit was filed, or that it constituted their home for one year next preceding the filing of the suit. On the contrary, the bill affirmatively alleges that the parties resided in Sharkey County, Mississippi up to thirty days before the filing of the bill of complaint and is silent as to where they or either of them resided during that thirty days.

"Home" and "domicile" may, and generally do, mean the same thing, but a "home" may be relinquished and abandoned, while the domicile of the party, upon which many civil rights and duties depend, may, in legal contemplation, remain. Thus, the home, within the meaning of a statute providing that a pauper shall be deemed to have a settlement in the town where he dwells and has his home, may be lost by his leaving the town where he has his home, without intending to return, though he fails to establish a home in any other place; and this is so without regard to whether he loses his domicile or not. *Inhabitants of Exeter* v. *Inhabitants of Brighton,* 15 Me. (3 Shep.) 58, 60.

The word "home" is undoubtedly the fundamental idea of domicile, though calling a place "home" as a matter of fact may not be and often is not entitled to much weight. The word "home" is very frequently used with reference to a place other than the legal and permanent domicile. *Pickering* v. *Winch,* 87 P. 763, 765, 769, 48 Or. 500, 9 L.R.A. (N.S.) 1159.

The allegation in the complaint goes no further than to charge that the parties established their home in Rolling Fork, Sharkey County, Mississippi, in 1942. There is no allegation that it remained their home for one year next

preceding the commencement of the suit, or remained their home at any time after 1942.

POINT EIGHT

Jurisdictional Facts Showing Right to Maintain Suit Must be Alleged in Complaint and Jurisdiction May Not be Inferred Argumentatively From Other Averments in Complaint.

It has been established under Point Six hereinabove that the statutory requirement of one year's residence in this state next preceding the commencement of the suit is jurisdictional and must be both alleged in complaint and proven on the hearing.

We feel that we have shown to the satisfaction of the Court under Point Seven that the allegations of fact in the complaint are not sufficient to charge that the respondent, Mrs. Chrismond, voluntarily took up actual residence within the state and actually resided there continuously for a period of one year next preceding the commencement of the suit, having all the while a fixed intention of remaining in the state, if not permanently, at least indefinitely.

The jurisdictional fact of actual bona fide residence in this state for a period of one year next preceding the commencement of this suit is not made by direct averments in the complaint, according to the rules of good pleading. Neither can the existence of such jurisdictional fact be inferred logically from the facts therein pled. However, even if the necessary bona fide residence for one year could be inferred from other averments contained in the complaint, still the Court would not have jurisdiction, for averments of jurisdiction must appear not by mere inference, but by distinct averments according to the rules of good pleading and the essential facts averred must show, not as a matter of inference or argument, but clearly and distinctly, that the

facts as alleged give the Court full jurisdiction to determine the controversy. *Hull* v. *Burr*, 234 U. S. 712, 58 L. Ed. 1557, 34 S. Ct. 892, 895 and cases therein cited; *Continental Life Ins. Co.* v. *Rhoades*, 119 U. S. 237, 30 L. Ed. 380, 7 S. Ct. 193.

POINT NINE

This Honorable Court will Grant Review on Writ of Certiorari Where There are Special and Important Reasons Therefor and, Where the State Court has Decided a Federal Question of Substance in a Way Probably Not in Accord with Applicable Decisions of This Court, Such will be Considered Sufficient Reason for Grant of Review by Certiorari.

The State Court has herein assumed to act in a matter in which it had no jurisdiction, and is depriving petitioner of his property by a void decree rendered without due process of law. The State Court's implied finding of jurisdiction is contrary to the holdings of this Court, the State Court was not a competent Court and its decree is coram non judice. *Scott* v. *McNeil*, 154 U. S. Rep. 34, 34 L. Ed. 896, 14 S. Ct. Rep. 1108; *Pennoyer* v. *Neff*, 95 U. S. 714, 733, 24 L. Ed. 565, 572; *Old Wayne Life Association of Indianapolis, Indiana* v. *Sarah McDonough et al*, 204 U. S. 8, 51 L. Ed. 345, 27 S. Ct. 226; *United States ex rel Texas Portland Cement Co.* v. *McCord*, 233 U. S. 157, 34 S. Ct. 550, 58 L. Ed. 893; *Hull* v. *Burr*, 234 U. S. 712, 58 L. Ed. 1557, 34 S. Ct. 892, 895 (pertinent part of opinion on p. 895 of 34 S. Ct.); *Continental Life Ins. Co.* v. *Rhoades*, 119 U. S. 237, 30 L. Ed. 380, 7 S. S. Ct. 193.

POINT TEN

The Federal Question was Properly Raised by Ground Number 8 of the Suggestion of Error, filed in the Supreme Court of Mississippi. Appendix "E" hereto.

Petitioner raised in Ground 8 of his Suggestion of Error, Appendix "E" hereto, filed in the Supreme Court of Mississippi the lack of jurisdiction in said Court to render a decree, that the decree rendered by the Chancery Court of Sharkey County was void and coram non judice; that the Lower Court having no jurisdiction the appellate court had none, except to dismiss the complaint, and that the decree deprived petitioner of his property without due process of law, in violation of Article Fourteen of the Amendments to the Constitution of the United States.

POINT ELEVEN

The Question of the Court's Jurisdiction was Raised Timely by the Suggestion of Error.

The question of the Court's lack of jurisdiction over the subject matter may be raised at any stage of the proceedings; *Green* v. *Creighton,* 10 S & M (18 Miss.) 742. It may be raised at any time by any party, by counsel, or by the Court on its own motion. *Waits* v. *Black Bayou Drainage District,* 186 Miss. 270, 185 So. 577. Even though the question of jurisdiction is not raised in the proceeding at all, a decree rendered in such proceeding is none the less void and unenforcible. *Pease & Dwyer Co.* v. *Somers Planting Co.,* 130 Miss. 147, 93 So. 673; *State* v. *Rogers,* 206 Miss. 643, 39 So. 2d 533, 537; *George* v. *Solomon,* 71 Miss. 168, 14 So. 531; *Garland* v. *Hull,* 13 S & M (Miss.) 76, 51 Am. Dec. 140; *Belew* v. *Jones,* 56 Miss. 342.

The Chancery Court of Sharkey County, Mississippi, had

no jurisdiction of the subject matter of the suit, because the bill of complaint did not contain the necessary and essential jurisdictional averments, as hereinabove shown. Hence, the Supreme Court of Mississippi had no jurisdiction on appeal. *Ball Brown & Co.* v. *Sledge,* 82 Miss. 747, 35 So. 214; *Welch* v. *Bryant,* 157 Miss. 559, 128 So. 734; *Mississippi State Highway Department* v. *Haines,* 162 Miss. 216, 139 So. 168; *J. R. Watkins Co.* v. *Guess,* 196 Miss. 438, 17 So. 2d 795.

Jurisdiction of an appeal cannot be conferred by consent of the parties. *Kelly* v. *Ladies' Aid Society of Pleasant Hill Schoolhouse,* 140 Miss. 580, 106 So. 627.

The right to raise the question of jurisdiction is not subject to waiver. *White* v. *State,* 190 Miss. 589, 195 So. 479.

Conclusion

The questions discussed are fundamental and of paramount importance. Petitioner's property is being taken from him by the void decree of a court without jurisdiction and in violation of the provisions of Section One of Article Fourteen of the Amendments to the Constitution of the United States.

With deference it is prayed that the Writ be granted and the decree reversed and remanded.

J. Wesley Miller
Ross R. Barnett
Counsel for Petitioner

Barnett, Jones & Montgomery
414½ East Capitol St.
Jackson, Mississippi.
of Counsel

APPENDIX "A"

IN THE CHANCERY COURT OF SHARKEY COUNTY, MISSISSIPPI

TO THE REGULAR JUNE TERM, 1950

NO. 4857

MRS. MABLE CHRISMOND, *Complainant*

vs.

LON CHRISMOND, *Defendant*

Final Order

This cause coming on to be heard on this day on a regular day of a regular term of this court upon original petition herein filed by the complainant and answer made thereto by the defendant, and testimony and documentary proof offered and adduced in the cause, and

The court having heard and considered the pleadings, exhibits, testimony, proof and documents offered and adduced in the matter, and having heard and considered argument of counsel for both the complainant and the defendant, doth find and adjudge:

It is, therefore, ordered that the bonds of matrimony created by the marrige of complainant and the defendant herein be and the same are hereby avoided, annulled, and held to be naught henceforth, and they, the said complainant, Mrs. Mable Crawford Chrismond, a female person of the caucasian race, and Lawton Chrismond, also known and denominated in the cause as Lon Chrismond, a male person of the caucasian race, be and they are hereby divorced the one from the other, in toto.

It is further adjudged by the court that a partition of the property described in the original bill in this cause to the extent hereinafter mentioned in kind should be made between the complainant and the defendant. It is therefore adjudged and ordered that the certain lot or parcel of land, together with all improvements, buildings, easements and appurtenances thereupon situate or thereunto appertaining,

constituting the homestead of parties hereto, and particularly described as:

> Lot Number Two (2) of Block Number One (1) of the McLaurin Addition to the Town of East Rolling Fork, as shown by Map or plat of J. N. Hall, C. E., now on file of the office of the Clerk of the Chancery Court of Sharkey County, Mississippi, reference to which is here made to aid this description, and being the same property conveyed by A. J. Baggett and Mildred McCaul Baggett to Lon Chrismond, by deed dated 17th day of July, 1942, and of record in the Land Deed Records of Sharkey County, Mississippi, in Deed Book 78, page 589, reference to which is here made to aid this description, all lying and situated in Town of Rolling Fork, Sharkey County, Mississippi,

should be and the same is hereby awarded to the complainant, Mrs. Mable Crawford Chrismond, free of lien or indebtedness.

It is, therefore, ordered that within thirty days from this date the said defendant, Lon Chrismond, shall make, execute and deliver to aforesaid Mrs. Mable Crawford Chrismond a good and valid deed of conveyance thereto conveying all of his right, title and interest in and to the said lot, improvements, easements, and appurtenances thereupon situated or thereunto appertaining; that in addition thereto, within thirty days from this date the said defendant, Lon Chrismond, shall discharge and release by payment any and all liens or incumberances upon said property, and by specifically paying and satisfying to the Bank of Anguilla, Anguilla, Miss., an indebtedness in the amount of $1,750.00 with accrued interest thereon against the said lot and improvements, and in event of failure of defendant, Lon Chrismond, to so execute and deliver the deed aforesaid, the Clerk of the Chancery Court of Sharkey County, Miss., is hereby constituted a Commissioner with full power and authority so to do.

It is further ordered, adjudged and decreed that an equitable lien is hereby imposed upon the lands and real prop-

erty described in the original bill of complaint in this cause, to-wit:

The SW¼ of SW¼, Section 4, Twp. 10 N., Range 7 W., the E½ of SE¼, Section 5, Twp. 10 N., R. 7 W., the W½ of NW¼ and the NW¼ of SW¼, Section 9, Twp. 10 N., Range 7 West;

The W½ of NE¼, Section 19, Twp. 12 N., Range 6 W., the E½ of the E½, Section 19, Twp. 12 N., Range 6 West, all lying and situate in Sharkey County, Mississippi; also

Begin at Northwest corner of Lot 1, of Block 1, of McLaurin Addition to Town of Rolling Fork, Miss., as shown by map or plat of said addition in the office of the Clerk of the Chancery Court of Sharkey County, Miss., thence 52 feet to point on North boundary line of said Lot 1; thence South 183 feet to the South boundary line of Lot 1; thence West to West boundary line of Lot 1; thence North along said West boundary line of said Lot 1, to point of beginning.

Also, beginning at Northwest corner of Lot 1, Block 1, hereinabove described; run thence West 20 feet to a point; thence South along a line parallel to the West boundary line of said Lot 1, 183 feet to a point thence East 20 feet to SW corner of said Lot 1, thence North along the said West boundary line of Lot 1, 183 feet to point of beginning.

Also, beginning on the North boundary line of said Lot 1 at a point 52 feet East from NW corner of Lot 1, Block 1, in said McLaurin addition; running thence East 8 feet; thence South 183 feet to South boundary of Lot 1; thence West 8 feet to a point; thence North 183 feet to point of beginning,

to secure the complainant payment of the indebtedness existing against said homestead, and in the event that within thirty days from this date, the said indebtedness against the said homestead and any and all other liens thereupon shall not have been paid and satisfied by the defendant herein the Clerk of the Chancery Court of Sharkey County, Miss.,

is hereby appointed a commissioner of this court with full power and authority and is hereby directed to advertise and sell in accordance with law, the said property or a sufficiency thereof upon which this lien is imposed to pay and satisfy the aforesaid lien, or liens and indebtedness, and it is further ordered that all costs accrued and to accrue in this cause is hereby taxed and assessed against the defendant herein, Lon Chrismond.

It is further ordered that upon delivery of good and valid deed to the said homestead as aforesaid by the defendant or commissioner, and payment of the indebtedness on the said homestead, and any other liens threupon by the defendant or commissioner the Lis Pendens Notice herein be cancelled of record, and upon such delivery and payment, the Clerk of this Court is authorized and empowered to cancel the same.

The decree heretofore awarding and granting alimony to the complainant is hereby cancelled, annulled, and for naught held.

The defendant feeling aggrieved, has requested an appeal to the Supreme Court and it is hereby granted.

Ordered, Adjudged and Decreed this the 22nd day of June, A. D., 1950.

FRANK E. EVERETT,
Chancellor.

APPENDIX "B"

CHRISMOND v. CHRISMOND

NO. 37948

SUPREME COURT OF MISSISSIPPI, DIVISION A

May 21, 1951.

Mrs. Mable Chrismond brought an action against Lon Chrismond. The Chancery Court, Sharkey County, Frank E. Everett, Chancellor, entered a decree adverse to the defendant and defendant appealed. The Supreme Court, Kyle, J., held that complainant who had lived in defendant's home,

cared for defendant and kept house for defendant, and worked and assisted defendant in accumulation of property, and had subsequently married defendant in good faith, when in fact defendant was incapable of contracting legal marriage because of defendant's prior marriage to another woman, and who thereafter had continued to work and assist defendant in defendant's business, was entitled to equitable division of property accumulated by joint efforts of complainant and defendant during time they lived together.

Affirmed.

1. Divorce—Key 154, 252
   Marriage—Key 61, 63

Where complaint was bill for divorce and where prayer for requested annulment of marriage and divorce and property division, and defendant's answer treated bill as bill to dissolve valid marriage and denied that defendant was legally married to complainant because defendant was not divorced from former wife, chancellor had jurisdiction to grant annulment or divorce, which ever was justified under evidence, and to provide for equitable division of property accumulated by joint efforts of parties during marriage relationship. Code 1942, Sec. 2735, subds. 7, 9.

2. Divorce—Key 130.

In divorce action brought by putative wife, evidence sustained finding that defendant had been guilty of habitual cruel and inhuman treatment of complainant.

3. Divorce—Key 231.

A valid marriage must exist before alimony can be allowed to wife.

4. Divorce—Key 258.

Where alimony is awarded to wife and is made payable in lump sum, alimony must be paid in money, and a part of husband's property cannot be awarded to wife in payment of alimony.

5. Marriage—Key 54.

Where complainant entered into arrangement with defendant wherein complainant lived in defendant's home, and

cared for defendant and kept house for defendant and worked and assisted defendant in accumulation of property, and complainant subsequently married defendant in good faith when in fact defendant was incapable of contracting legal marriage because of defendant's prior marriage to another woman, and complainant thereafter continued to work and assist defendant in defendant's business, complainant was entitled to equitable division of property accumulated by joint efforts while they lived together.

J. Wesley Miller, Rolling Fork,
Barnett, Jones & Montgomery, Jackson,
For Appellant.

Butler, Snow & O'Mara, Jackson,
John B. Gee, Rolling Fork,
For Appellee.

Kyle, Justice.

This is an appeal by Lon Chrismond, defendant in the court below, from a decree of the chancery court of Sharkey County in favor of Mrs. Mable Chrismond, complainant, annulling the bonds of matrimony created by two purported marriages of the complainant and the defendant, and granting to the complainant an absolute divorce from the defendant, and awarding to the complainant certain real property as her equitable share of the property accumulated by the joint efforts of the parties during their relationship before and after the purported marriages.

The complainant in her bill of complaint alleged that the complainant and the defendant were married in Lake Village, Arkansas, on November 15, 1942 (the proof shows August 27, 1943 or 1945), and thereafter lived together as husband and wife in Sharkey County, Mississippi, until approximately 30 days before the filing of the bill of complaint; that through their joint efforts and savings they accumulated a substantial amount of property, which consisted of farm lands and other real property situated in Sharkey County; that the defendant a short time before

their separation began to mistreat the complainant, and to curse and use abusive language toward the complainant, and threaten to strike her, and that the defendant finally stated to the complainant that he had a living wife undivorced; and that the complainant thereafter left the defendant and since that time had lived apart from him. The complainant in her bill of complaint asked that the bonds of matrimony be annulled and that she be granted a divorce from the defendant, and the complainant also asked for a partition of the property that had been accumulated through their joint efforts during the time they had lived together, or for alimony which should constitute a lien upon the property.

The defendant in his answer denied that he and the complainant were married according to law in Lake Village, Arkansas, as alleged in the bill of complaint. The defendant alleged in his answer that he had met the complainant sometime during the year 1939; that the complainant at that time was married to one John Lowery and was the mother of a child named Faye Lowery; that John Lowery had separated from the complainant, and that the complainant requested employment by the defendant as housekeeper and that he had employed her as such; that she moved into his house under that arrangement and worked for him, keeping house for him and at times driving his automobile while he was on the road engaged in his business of selling cakes, cookies, and other confections; that the defendant at that time was married to Clara Bell Simpson Chrismond, who was living apart from the defendant, in Bogalusa, Louisiana. The defendant further stated that it was understood by the complainant and the defendant at that time that both parties were married and that neither of them had obtained a divorce; that sometime during the year 1945 the complainant obtained a 90-day divorce from her husband, John Lowery, in the State of Arkansas, and that soon thereafter the complainant and the defendant obtained a marriage license and were married at Lake Village, Arkansas; that the complainant's husband, John Lowery, obtained a divorce from complainant in Leake County, Mississippi, in 1948, and that the complainant and defendant thereafter obtained another marriage license in Sunflower County and were remarried

in that county. The defendant admitted in his answer at that time he had not been divorced from his former wife who lived in Bogalusa, Louisiana.

The defendant denied that the property that he owned had been accumulated as a result of the joint efforts of the complainant and the defendant, and he denied the charge of cruel and inhuman treatment contained in the bill of complaint; and the defendant asked that the bill of complaint be dismissed.

The proof showed that the complainant had been married to John Lowery at Carthage in Leake County in 1928, and that she and her husband had lived together in Leake County until about 1935 when they moved to Sharkey County; and that they were living in Sharkey County when they separated a year or two later; that about 1941 the complainant moved into the home of the defendant in Sharkey County where she continued to live until the date of their separation in 1949; that sometime after moving into the home of the defendant the complainant obtained a 90-day divorce in the City of Little Rock, Arkansas, and that the complainant and the defendant were married at Lake Village, Arkansas, on August 27, 1943 or 1945. The proof showed that the complainant's former husband, John Lowery, obtained a divorce from the complainant in 1948, and that the complainant and the defendant were remarried in Sunflower County, Mississippi, on February 14, 1948. The defendant during all of this time had a wife living in Bogalusa, Louisiana, from whom he had not been divorced.

The proof showed that the complainant during the eight or nine years that she and the defendant lived together cooked the meals for the family and attended to all of her household duties and ministered to the personal needs of the defendant, who was a cripple and unable to walk except with the aid of crutches. The defendant was engaged in the business of a transient vendor of cakes, candies, cookies and other confections, which he sold on consignments along the routes which he travelled over the county. The two worked together much of the time; and succeeded in making the business a profitable business. The complainant testified that they wanted to build up the business and to accu-

mulate property, that they worked seven days in each week, and that it was through their joint efforts that they succeeded in accumulating the property which the defendant owned at the time of the filing of the bill of complaint. The defendant admitted that the complainant helped him carry on his peddling business during much of the time that they lived together. The proof showed that at the time of the filing of the bill of complaint the defendant was the owner of farm land and other real property of the value of approximately $40,000, and that the property was encumbered by mortgage deeds of trust in the amount of approximately $12,500.

The chancellor found that the property owned by the defendant at the time of the filing of the bill of complaint, with the exception of the Onward Plantation, had been acquired through the joint efforts of the complainant and the defendant during the time they lived together. The chancellor found that the marriage of the complainant and the defendant in Arkansas in 1945 and the marriage in Mississippi in 1948 were both void marriages, because the defendant at the time of each of said marriages had not been divorced from his former wife who was living in Bogalusa, Louisiana. The chancellor stated that the evidence failed to show that the defendant ever at any time advised the complainant that he had not been divorced from his former wife; and the chancellor stated that whether the complainant's Arkansas divorce was valid or invalid (and he did not deem it necessary to pass upon that question), the complainant had been led to believe that it was valid and that she had a right to marry after obtaining the Arkansas divorce. The chancellor found that the complainant at the time of her second marriage to the defendant had not been advised by the defendant that he had never been divorced from his first wife; and the chancellor found that the complainant entered into the two marriages with the defendant in good faith.

The chancellor held that the parties had never been lawfully married, and that under the decisions of this Court alimony could not be granted to the complainant. The chancellor held, however, that the defendant's ceremonial marriages to the complainant in Arkansas and in Mississippi

raised the presumption that the defendant had been divorced from his former wife, and that the defendant should not be permitted to come into a court of equity and set up his former marriage to defeat a recovery by the complainant in a suit of this kind, after he had entered into the two marriages with the complainant knowing that he had not been divorced from his former wife.

The chancellor entered a decree annulling the bonds of matrimony created by the marriages of the complainant and the defendant to each other and granting to the complainant an absolute divorce; and the chancellor in the decree ordered that the homestead property, situated in the Town of Rolling Fork and occupied by the parties as a homestead, be awarded to the complainant, free and clear of all indebtedness, and that the defendant execute and deliver to the complainant within 30 days from the date of the decree a proper deed of conveyance of the homestead property and discharge all liens against the property so that the complainant would be invested with a valid unencumbered title to the property.

The appellant in his assignment of errors and in his brief contends (1) that the court erred in granting the divorce for the reason that no lawful marriage existed between the parties and the court had no authority to grant the divorce; (2) that the court erred in granting the divorce on the grounds of habitual cruel and inhuman treatment, because the proof did not warrant a divorce on the grounds alleged; and (3) that the court erred in ordering the appellant to convey to the appellee the homestead property. The appellant also contends that, in view of the fact that the marriages between the parties were void, the chancellor had no authority to allow alimony to the putative wife or to require the conveyance of property to her in settlement of her claim for alimony; and that, in view of the fact that the complainant's bill was in form a bill for divorce and alimony, the chancellor had no authority to treat the same as a bill for an annulment of the marriages and a division of property.

The appellee, in answer to the contentions made by the appellant, says that although the suit was instituted as a

divorce proceeding the pleadings were so drawn and the issues so shaped by the pleadings and the proof that it was within the power of the court to grant relief, whether in the form of a decree of divorce or in the form of a decree of annulment, and to provide for an equitable division of the property accumulated by the joint efforts of the parties during their marriage relationship.

In discussing these questions we shall deal first with the form of the pleadings and the point made by the appellant that the jurisdiction of the court was limited by the pleadings to a suit for divorce from the bonds of matrimony created by a valid marriage.

Section 2735, Code of 1942, provides that divorces from the bonds of matrimony may be decreed to the injured party for any one or more of the twelve causes mentioned. Among those causes are (7th) habitual cruel and inhuman treatment, and (9th) marriage to some other person at the time of the pretended marriage between the parties.

(1) The bill of complaint filed in this cause was a bill for divorce. The complainant alleged in her bill habitual cruel and inhuman treatment as grounds for divorce. The complainant also alleged in her bill as a cause of the separation that immediately before the separation the defendant stated to her that he had a living wife from whom he had not been divorced. The complainant in her prayer for relief asked that the marriage be annulled and that she be granted a decree of divorce and a division of the property. The defendant in his answer, treating the bill as a bill to dissolve a valid marriage, denied that he had ever been legally married to the complainant for the reason that he had never been divorced from his former wife.

It would probably have been the better practice for the complainant, after the filing of the defendant's answer, to have amended her bill for the purpose of adopting in the alternative the allegations of the defendant's answer showing the invalidity of the marriage; but we think that without such amendment the issues to be determined by the court were presented by the pleadings with sufficient clarity to enable the court to proceed with the trial, and the court under the special prayer and the general prayer contained

in the bill had jurisdiction to grant any relief consistent with the bill and within its scope which might be justified by the facts proved upon the hearing. Griffith's Mississippi Chancery Practice, 2d. Ed. 1950, par. 186 and par. 187, pp. 173, 174.

(2) The evidence was sufficient to support the findings of the chancellor on the issue of habitual cruel and inhuman treatment and on the other issues presented by the pleadings; and the defendant admitted that at the time of his marriage to the complainant he had a wife living from whom he had not been divorced.

The most difficult question that we have had to deal with on this appeal is the question as to the right of the complainant to an equitable division of the property acquired by the defendant as the result of the joint efforts of the parties during their marriage relationship.

(3, 4) This Court has held that a valid marriage must exist before the court can allow alimony to the wife. *Reed* v. *Reed,* 85 Miss. 126, 37 So. 642; *Aldridge* v. *Aldridge,* 116 Miss. 385, 77 So. 150. This Court has also held that where alimony is awarded to the wife and is made payable in a lump sum, it must be paid in money, and that the court cannot award a part of the husband's property to the wife in payment of alimony. *McCraney* v. *McCraney,* 208 Miss. 105, 43 So. 2d 872. But those cases have little bearing upon the question that we have presented on this appeal. The record in this case shows that there was no valid marriage between the parties.

There are but few reported decisions involving questions of the property rights of a putative wife, where for one reason or another the supposed marriage turns out to be void, but in a majority of the cases that have come to our attention relief of some character has been granted.

We have here presented the question whether a woman who has entered into an arrangement with a man whereby she has lived in his home, cared for him and kept house for him, worked and assisted him in the accumulation of property, and has subsequently married him in good faith, when in fact he was incapable of contracting a legal marriage with her because of his prior marriage to another woman, and

who thereafter has continued to work and assist him in his business, is entitled to an equitable division of the property accumulated by their joint efforts during the time they were living together.

We think that the equitable powers of the court are sufficient to protect the rights of the putative wife, where the supposed marriage which she entered into in good faith turns out to be void, and that she is entitled to an equitable division of the property accumulated by their joint efforts during the time they lived together as man and wife.

In 35 Am. Jur., p. 216, Marriage, Sec. 53, the rule applicable to cases of this kind is stated as follows: "It is a general rule that when a woman in good faith enters into a marriage with a man who is incapable of contracting marriage because of some impediment, or when both of the parties enter into a void marriage in good faith, the woman is entitled to a division of the property accumulated by the joint efforts of the parties during their relationship, and on an annulment of the marriage the courts usually assume jurisdiction to make an equitable division and settlement of the property acquired during the cohabitation of the parties, either by way of a division of the property or an allowance to the wife in the nature of alimony, at least where she has lived as the wife of the other party in good faith."

In the case of *Werner* v. *Werner,* 59 Kan. 359, 53 P. 127, 41 L.R.A. 349 which is cited as one of the leading cases on the point that we now have under consideration, the court said: "Emil Werner complains of the ruling of the court awarding Rosa a share of the property, contending, first that she was never, in fact, his wife, and that alimony is never awarded to a woman who is not a wife. It is true, as the plaintiff in error contends, that the marriage between the parties was absolutely void from the beginning. Although living together as husband and wife, they were not, in fact, married, and hence no allowance could be made as alimony. The rule is that permanent alimony can only be allowed where the relation of husband and wife has existed; but this rule does not preclude an equitable division of the property where there is a judicial separation of the parties on account of the invalidity of the marriage contract. *Fuller*

v. *Fuller*, 33 Kan. 582, 7, P. 241. Strictly speaking, this action as it was tried was not a divorce proceeding, but it was rather one to annul a void marriage. Although instituted under the statutes to obtain a divorce, the pleadings were so drawn, and the issues so shaped, that it was within the power of the court to grant relief independently of the statutes relating to divorce, and it rendered a decree of nullity, rather than a decree of divorce. * * * Even in cases where the marriage is valid, and a divorce is refused for any cause, the court may adjudge an equitable division and disposition of the property of the parties. Code Civ. Proc., Sec. 643. But, independently of the statute of divorce, we think the court had authority to decree not only an annulment of the marriage, but also the division of the property which had been jointly accumulated by the parties. It was an equitable proceeding, and within its equity power the district court had full jurisdiction to give adequate relief to the parties."

In the case of *Krauter* v. *Krauter*, 79 Okl. 30, 190 P. 1088, the court held that in an action where a marriage is found and decreed to be incestuous and void because the parties were first cousins, the woman having entered into the marriage contract in good faith, the court, while it cannot grant alimony as such, has authority to make an equitable division of the property jointly accumulated by the parties while they lived together as husband and wife.

No decision of this Court bearing directly upon the point that we now have under consideration has been called to our attention. But in his Treatise on Divorce and Separation in Mississippi, Judge Amis has said that since a nullity suit is an equitable proceeding all property rights and equities growing out of or connected with the supposed marriage relation between the parties may be adjusted by the court, whether the marriage was void or voidable; and if the parties have by their joint efforts acquired property during the supposed marriage an equitable division of it may be ordered, no matter whether the title thereto be in one or both jointly.

(5) In view of the principles set forth in this opinion and the authorities cited in support of those principles, we think that the chancellor was justified in granting to the appellee the decree of divorce and annulment of the mar-

riage between the appellee and the appellant, and in awarding to the appellee an equitable share of the property accumulated by the joint efforts of the parties while they lived together as husband and wife, and that the decree of the lower court should be affirmed.

Affirmed.

APPENDIX "C"

IN THE SUPREME COURT OF MISSISSIPPI

NO. 37,948

DIVISION A

LON CHRISMOND, *Appellant*

vs.

MRS. MABLE CHRISMOND

We, the undersigned Judges, are of the opinion that the Suggesion of Error filed in the above styled cause on May 31, 1951, should be and the same is hereby overruled.

This July 9th, 1951.

/s/ HARVEY MCGEHEE
PERCY M. LEE
JOHN W. KYLE

Filed July 9th, 1951, Tom Q. Ellis, Clerk.

APPENDIX "D"

Section 2736 of the Mississippi Code of 1942:

Sec. 2736. Jurisdiction limited.—The jurisdiction of the chancery court in suits for divorce shall be confined to the following cases:

(a) Where one of the parties has been an actual bona fide resident within this state for one year next preceding the commencement of the suit.

(b) In any case where the proof shows that a residence was acquired in this state with a purpose of securing a divorce, the court shall not take jurisdiction thereof, but dismiss the bill at the cost of complainant.

APPENDIX "E"

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

LON CHRISMOND, *Appellant*

vs.

MRS. MABEL CHRISMOND, *Appellee*

NO. 37,948

SUGGESTION OF ERROR

Now comes Lon Chrismond, appellant in the above styled cause, and suggests that this Honorable Court erred in the opinion heretofore rendered by it on May 21, 1951, affirming the decree of the Lower Court, and for grounds of error suggests the following:

1. If this Honorable Court, in its opinion, construed the bill of complaint in this case to be a bill for divorce and affirmed the decree of the Lower Court on the ground that appellant was estopped to set up the invalidity of the marriage, the Court erred in this regard, because the appellant, defendant below, had a lawful right to plead the invalidity of the marriage and was not estopped from so doing. On proof of the fact of a previous marriage still existing at the time of the pretended marriage between the parties, the Court below should have dismissed complainant's bill for divorce and erred in not so doing, and this Honorable Court erred in affirming said erroneous decree of the Lower Court.

2. If this Honorable Court, in its opinion, held the bill in this case to state a cause of action for divorce, justifying the decree of the Lower Court, this Honorable Court erred in so doing for the reason that the bill of complaint does not

allege that the complainant had been an actual, bona fide resident citizen of the State of Mississippi for a period of one year next preceding the commencement of the suit, as required by Section 2736, Code of 1942, and this fact is jurisdictional. In the absence of an allegation of such fact in the bill, the bill states no cause of action for divorce and no divorce can be granted upon it. The question of its insufficiency to state a cause of action may be raised in the Supreme Court for the first time and may be raised on suggestion of error for the first time. If this Honorable Court construed the decree below as one for divorce, it erred in upholding and affirming it.

3. If this Court construed the bill of complaint in this case as being for divorce, and affirmed the decree of the Lower Court awarding a divorce on the ground of a marriage to some other person at the time of the pretended marriage between the parties, then the Lower Court erred and this Court erred for the reason that the bill of complaint in this case states only one ground for divorce—that of habitual cruel and inhuman treatment—and the statutory affidavit to the bill reaches only to that ground and the bill does not allege as a ground of divorce a marriage to some other person at the time of the pretended marriage between the parties.

4. If this Court construed the original bill in this case to be one for divorce and affirmed the decree of the Lower Court, as being a proper decree to be rendered in a suit for divorce, then this Court erred in upholding the provisions of the decree awarding alimony, since the undisputed proof in this case is that the parties had never been lawfully married and alimony cannot be allowed in the absence of proof of a valid marriage, and this Court erred in holding to the contrary.

5. If this Court construed the bill in this case to state a cause of action for divorce, then this Court erred in holding that the decree of the Lower Court had the power by its decree to transfer the title to real estate, as alimony, for the reason that the Court's power is limited to awarding alimony in a lump sum or in installments and McRaney vs. McRaney so holds.

6. If the Court construed the original bill of complaint in this case to state a cause of action for an annulment of the marriage, and affirmed the decree of the Lower Court on the theory that it was a decree of annulment, then this Honorable Court erred for the reason that the bill of complaint does not state a cause of action for annulment and affords no legal basis justifying the rendition of a decree of annulment, and this Honorable Court erred in not so holding.

7. If this Court construed the bill of complaint in this case as stating a cause of action for annulment and affirmed the decree of the Court below as a proper decree to be rendered in a suit for annulment, then this Honorable Court erred in so holding for the reason that "marriage to some other person at the time of the pretended marriage between the parties" has been by the Legislature made a ground for divorce in this state, and the divorce statute abrogates the common law right to maintain a suit for annulment on that ground and no suit for annulment on that ground can be maintained in the courts of this state.

8. The bill of complaint in this case states no cause of action either for a divorce or for an annulment of the marriage and the taking of Lon Chrismond's property by judicial fiat is without authority of law, and is in violation of his constitutional rights under the due process clauses of the State and Federal Constitutions, being Articles V and XIV of the Constitution of the United States and Section 14 of the Constitution of the State of Mississippi of 1890, and he here and now claims and asserts these Constitutional Rights and the right of appeal to the Supreme Court of the United States if his constitutional rights are denied him by this Honorable Court.

Respectfully submitted,

/s/ J. Wesley Miller
Rolling Fork, Mississippi
Barnett, Jones & Montgomery
Jackson, Mississippi

By: /s/ M. B. Montgomery
Of Counsel
Attorneys for Appellant.

Certificate

I, M. B. Montgomery, of counsel for appellant, hereby certify that I have this day mailed postage prepaid a true and correct copy of the foregoing brief for appellant, to Hon. John B. Gee, c/o Workmen's Compensation Commission, 218 South President Street, Jackson, Mississippi, and have personally delivered a true and correct copy of said brief to Messrs. Butler, Snow & O'Mara, Deposit Guaranty Bank Building, Jackson, Mississippi, of counsel for appellee.

This the 31st day of May, 1951.

/s/ M. B. Montgomery

APPENDIX "F"

OPINION OF THE CHANCELLOR

THIS CASE presents a very dark picture, both from a legal and moral point of view; the evidence showing that these parties lived together from approximately 1940, up until the so-called marriage in 1943 or 1945, whichever it might be.

I think the complainant, and the whole testimony combined, taken as a whole, has established the fact that prior to the divorce obtained by Mrs. Chrismond in Arkansas the matter was discussed or understood between she and the defendant, the evidence showing, without contradiction, that the defendant took the complainant, accompanied by his sister,—I believe that is true,—to Tallulah, Louisiana, that she might catch a train to Little Rock, for the purpose of establishing a residence and obtaining a divorce from her husband; that she remained there for three months, the time required by the Arkansas Law for residency in order to obtain a divorce; that during that time she stayed with the defendant's sister, and that all parties knew what she was doing there, and her purpose; and the evidence further shows, without contradiction, that the defendant paid the expenses of that divorce. The complainant also testified that it was the purpose and intention of she and the defend-

ant to reside in Arkansas, but for some reason, which I don't now exactly recall, they came back to Mississippi, and on the way back procured a marriage license and were married.

I think the activities of the defendant, and his sister, in encouraging this divorce in Arkansas contributed largely to the acts of the complainant in going to Arkansas to establish her residence to obtain a divorce.

Afterwards they lived together as man and wife under that Arkansas divorce and marriage; the evidence fails to show that the defendant ever, at any time, advised the complainant that he did not have a divorce from his former wife,—and whether that Arkansas divorce was good or bad, or which, on which I do not pass,—I think the complainant was led to believe that it was a good divorce, and that she had a right to marry thereafter. Later on her former husband filed suit for divorce in Leake County, and we are advised a divorce was granted, and shortly thereafter the parties went to Sunflower County, obtained another marriage license, and were again married,—and up to that time the defendant had not advised the complainant that he had never been divorced from his first wife. So I think that evidence shows good faith on the part of the complainant.

Now the evidence shows a number of pieces of property which were acquired by the defendant, not only during the time of their actual marriage, but from 1942,—some of the deeds offered in evidence showing that date.

The defendant testified that the complainant was of great aid and service and assistance to him in his business, and I think it is fair to assume, from all of the evidence in this case, that it was through the joint efforts of the two that all of the property which has been testified about, with the excepion of Onward Plantation, was acquired through their joint efforts, the Onward place being purchased by the defendant prior to the time that he and the complainant became involved with each other,—and I do not take that property into consideration.

The evidence further shows that the marriage in Arkansas, and the marriage in Mississippi in 1948, were both void marriages, because the defendant was not in a position to

enter into a marriage, and I do not think that he can now set up his unlawful acts, and his unlawful conduct, in bar of a suit by the wife.

However, I believe the authorities generally hold that before alimony can be granted, there must have been a lawful marriage.

The entering into this ceremonial marriage in Arkansas, and then in Mississippi, raised the presumption that the defendant had been divorced from his former wife and I don't think that the defendant should be permitted to come into this Court of Equity at this time and set up his former marriage to defeat a recovery here, when he entered into the two marriages with the complainant, knowing that he had not been divorced from his former wife; neither do I think that any man has a right to take any woman—whether they live together in a state of adultery, or whether in the shadow of a pretended marriage, and have her toil by his side day in and day out, year in and year out, and then take the fruits of that toil all to himself:

THEREFORE, it is the decree of this Court that the complainant be granted a divorce, and that the defendant shall, within thirty days from this time, convey to the complainant the property which has been designated as the home; and that he pay the indebtedness now on that home of $1750.00, thereby conveying to her an unencumbered piece of property, in payment of the services that she rendered, as she worked along with him day in and day out, and year in and year out for a period of nine or ten years; and, upon the failure of the defendant to so convey such property within thirty days from this time, the Chancery Clerk of Sharkey County, Mississippi, is hereby appointed a commissioner to convey said property to the complainant, and if she be called upon for the payment of the mortgage, by his failure to remove the lien thereon to that extent,—a lien to that extent is created on the remainder of the property of the defendant, which has been shown in evidence here.

Prepare your decree accordingly.